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CHARLES ELMORE ORDER  
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NO. 4371

In The  
**Supreme Court**  
of the United States

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OCTOBER TERM, 1945

CORNUCOPIA GOLD MINES, a private Corporation,  
*Petitioner and Appellant,*

vs.

CARL LOCKEN, Administrator of the Estate of Anna  
Locken, Deceased,  
*Respondent and Appellee.*

**Petition for Writ of Certiorari and  
Brief in Support Thereof**

JAMES ARTHUR POWERS,  
DEAN H. DICKINSON,  
*Attorneys for Petitioner.*



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**Petition for Writ of Certiorari  
and Brief in Support Thereof**

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*To: The Honorable Harlan Fisk Stone, Chief Justice,  
and Hugo L. Black, Stanley Reed, Felix Frankfurter,  
William O. Douglas, Frank Murphy, Robert H. Jack-  
son and Wiley Rutledge, the Associate Justices of the  
Supreme Court of the United States.*

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The petitioner, Cornucopia Gold Mines, respectfully  
petitions this Honorable Court for Writ of Certiorari

to the United States Circuit Court of Appeals for the Ninth Circuit.

## **SUMMARY STATEMENT OF THE MATTER INVOLVED**

The District Court in a tort action (without a jury) declined to declare the local law put in issue, and in violation of Rule 52 (a) of the Federal Rules of Civil Procedure refused to make findings on pivotal question as to status of deceased at place where accident occurred and without which there is no basis under the Oregon law for determining liability, i.e., if deceased was there as an invitee, the rule of ordinary care applies; whereas, if deceased was there as licensee (or trespasser), the Oregon rule requires a showing of "wilful or wanton" injury. There was no claim made nor issue raised that Petitioner was guilty of "wilful or wanton" conduct. The Circuit Court of Appeals in affirming declined to declare the local law and assumed facts which the District Court had refused to find; supplied new unsupported fact that Petitioner was guilty of "wanton" negligence and upheld judgment on general law contrary to the local law, and on a new theory not in issue, namely, that Petitioner was charged with an active duty to keep the premises safe for deceased even though she be classed as a trespasser.<sup>1</sup>

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<sup>1</sup> See Analysis of Circuit Court's Opinion at Page 32 of supporting brief.

The action is for alleged wrongful death commenced by Appellee, as Administrator of the Estate of Anna Locken, Deceased, who was electrocuted through touching an electric wire which broke and fell into brush under Petitioner's 2300 volt private electric line used in its mining operation. The accident occurred some 50 miles North of Baker, Oregon in a remote area on the east side of the Wallowa mountains. The body of deceased was found 251 feet from a private road built by Petitioner for hauling ore from its Union mine. The road, a mile and one-half in length, leads from the ghost mining town of Cornucopia, Oregon, up the mountain side to Petitioner's Union mine, where it terminates. At the time of the accident, Union mine had been shut down for a period of over six months and the ore road was not in use. There was no travel on the road during the winter; no one was living in that section; in that area snow piles up in the winter to a depth of nine to thirty feet; there were no people during that period up in that vicinity. (R 62, 211). In order to travel up the road to the mine during the snow season, it was frequently necessary to go on snow shoes. The actual location of the point where the accident occurred was not in dispute; the dispute was over who owns the land, and her status there. Deceased started up the road with her mother. They were "looking for mushrooms. We were just playing" (R 77). She disappeared from her mother's sight, wander-

ing off the road at some unknown point into the brush. She was found beneath Petitioner's electric line where a wire had broken and fallen into the brush below; her hand had touched the electric wire. Appellant's surveyor testified from actual survey and established legal boundaries that the point of the accident was 85 feet inside Appellant's property line. Mr. Sneddon, mine superintendent, had been up the road a week before the accident and the wire then was in its proper place. The line had been built some six (6) years before the accident; it consisted of a three-phase circuit of No. 4 hard drawn copper wire carrying alternating current. There had been no previous breaks in the wire up to the time of the accident. (R. 122, 201, 231.) There is no evidence that the wire had been down for any period of time prior to the accident.

The status of the deceased at the place of the accident was put in issue. The complaint was framed on the theory that the deceased was lawfully at the place where the accident occurred (R 6) and upon the trial, Respondent undertook to prove that the accident occurred on premises of a third party and claimed the right to recover solely on the basis, that the accident did not occur on Petitioner's premises (R 137, 138, 139). Petitioner took the position that deceased entered and was injured upon its premises occupied by its electric line and was there solely for her own pleasure and without any business with

or invitation from Appellant.

This defense is based on the local law of the State of Oregon, which has been declared by the Supreme Court of Oregon, to the effect that a property owner is not liable for injuries sustained upon his land by a licensee or trespasser unless the injury was inflicted "wilfully or wantonly" by the property owner; and that a person who goes upon the premises of another for his own pleasure and without benefit to or invitation from the owners occupies the status thereon at most of licensee or trespasser. In Oregon, the law is that when such a person for his own purpose or pleasure makes use of another's property, even with the owner's knowledge, he is there merely by toleration; it is merely by a permissive use which cannot and does not ripen into an invitation. The pretrial order raised these basic questions:

"Who owned the property at the place where the accident occurred and which party has the burden of proving ownership of said property?"

and the further question of:

"What, if any, legal duty was owed by defendant to decedent, and was there a violation of any such legal duty?"

The Court did not make a ruling during the trial as to who had the burden of proving ownership of the property, or what duty was owed by defendant to decedent. At the conclusion of the trial, ownership of the premises in order to determine the status of deceased was recognized as the controlling issue, the District Court was of such opinion, and so stated, (R 246):

“The Court: All right. There is only one thing I want to make perfectly plain to you now, that whoever carries the burden of establishing where this spot is loses it, from the testimony I have got from you right now; whoever is carrying that burden as to where the spot was, loses out, either side.

“Mr. Powers: That is, as to the ownership of the property, you mean?

“The Court: Yes.”

This point of who had the burden of proving ownership of the property where the accident occurred was thereafter briefed in the lower court, and when it became obvious that the plaintiff had the burden of proving the deceased's right to be at the place where the accident occurred, the Court during hearing on petitioner's objections to proposed findings for failure to determine specific questions raised in pre-trial order changed its view that the party having that burden would lose the case and stated it would get around that point by saying the acci-

dent happened close to the property line, "maybe within a few feet." (R 257):

"The Court: No. You are trying to make me find on one side or the other, and *I do not think the evidence is sufficient to find one way or the other.* The way I got around it was to say that there is no question but what it is extremely close to the line; that either way the line may happen to fall, this spot is very close to the edge of the property, maybe within a few feet, and that is all even the defendant's evidence shows on the subject, but it did seem to me a competent surveyor could have gone in there and settled this question, but that was not done. \* \* \*

Respondent's counsel by objection prevented further survey from being made (R 247). Defendant's evidence shows the accident occurred 85 feet inside its property line and the Court refused to find against Petitioner on the point.

(R 253) "I would answer the question squarely, if I thought I could, but from the evidence I don't think it can be, and I won't make a finding against the defendant."

The court thereafter entered judgment without declaring any legal theory on which Petitioner was being held liable.

Written objection to this unusual course of judicial

procedure was filed in the District Court by Petitioner, and the District Court was expressly requested to comply with Rule 52 (a) of the Rules of Federal Procedure, namely "to find the facts specially and state separately its conclusions of law thereon." (R22)

Upon appeal to the Ninth Circuit Court of Appeals, Petitioner in its Specification of Errors raised these same questions. Petitioner in its brief took the position that it was relying entirely upon the Oregon law. *Erie R. Co. v. Tompkins* (304 U.S. 64, 82 L. Ed. 1188) was cited to the Circuit Court in requesting it to declare the Oregon law. The Circuit Court declined to do so. The Circuit Court of Appeals in affirming the lower court failed to declare the Oregon law; its decision is grounded solely upon a single case from the State of Washington and a general statement from the Restatement of the Law of Torts. In short, the Circuit Court bypassed the Oregon law which holds that the deceased under the uncontradicted facts here, would be either a licensee or a trespasser, and that there is no liability except for "wilful or wanton" injury.

Appellant briefed the point in the court below, citing the leading case in Oregon, namely: *Lange v. St. Johns Lumber Co.*, 115 Or. 337 (237 Pac. 696), and other decisions by the Supreme Court of Oregon which follow, and there are none to the contrary. The Circuit Court

of Appeals declined to give consideration to these authorities.

In its decision, the Circuit Court of Appeals assumes that the accident occurred on Appellant's property, although there was no such finding by the District Court. Under the assumed fact that the accident occurred on Petitioner's premises, the Circuit Court declares that Petitioner owed the deceased the duty of exercising ordinary care. The Circuit Court to bolster its decision concludes that Appellant was guilty of "wanton" negligence (R 275). Such finding is contrary to the view of District Court; moreover, it is outside the issues and is directly contrary to Oregon law (brief P. 37). In short the case was tried in the lower court on one theory: the District Court entered judgment on some undisclosed theory and the Circuit Court affirms by supplying new factual conclusions on a third theory.

## JURISDICTION

The date of the judgment to be reviewed is June 29th, 1945.

The statutory provision which is believed to sustain the jurisdiction of this Court is Sec. 240 (Title 28—Sec. 347 U.S.C.A.) of the Judicial Code as amended).

Jurisdiction obtained in the Federal Court by reason

of diversity of citizenship. The jurisdiction of this Court is beyond question. This Court has issued Writ of Certiorari to review a judgment of a Circuit Court of Appeals upon a showing that the Federal Court had decided the case upon general law and declined to declare the local law in issue in probable conflict therewith, *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188.

Further, this Court has jurisdiction to decide whether Rule 52 (a) of Federal Rules of Civil Procedure makes it mandatory upon a District Court trying an action without a jury "to find the facts specially and state separately its conclusions of law thereon" to the end of clearing conflicting interpretations placed thereon by several Circuit Courts of Appeal. The Ninth Circuit Court of Appeals in this case in attempting to supply essential facts upon vital issues which were left unresolved by the lower court is in conflict with *Bowles v. Russell Packing Co.*, 140 F. (2d) 354 (CCA 7), and *Brown v. Quinlan, Inc.*, 138 F. (2d) 288 (CCA 7), *Ordinary of State of New Jersey v. United States Fidelity & Guaranty Co.*, 136 F. (2d) 537 (CCA 3), and *Wessel, et al, v. Seminole Phosphate Co.*, 13 F (2d) 999 (CCA), and this Court has jurisdiction to place a final interpretation as to whether this rule is mandatory and must be complied with.

## QUESTIONS PRESENTED

### I

Whether it is an unconstitutional usurpation of judicial authority for a Circuit Court of Appeals in affirming judgment of lower court to decline to declare issue of State law and instead place its decision on basis of general law in view of the interpretation given to Section 34 of the Federal Judiciary Act of September 24, 1789 (Sec. 28 U.S.C.A. Sec. 725) by this court in *Erie R. Co. v. Tompkins*, 304 US 64, 82 Law Ed 1188.

### II

Whether District Court trying tort action without jury can enter a valid judgment without making basic finding of fact, i.e., status of deceased on premises; whether she was invitee or mere licensee; and without deciding the local law arising out of one or the other of such legal relationships in issue in light of Rule 52 (a) of the Federal Rules of Civil Procedure.

### III

Whether under Oregon law there is any evidence to support the judgment, and particularly whether there is any evidence to support the facts and conclusions supplied by the Circuit Court of Appeals to the effect that petitioner was guilty of "wanton" negligence, and

whether there is any evidence to support the verdict on the theory that deceased was an invitee.

## REASONS RELIED ON FOR ALLOWANCE OF WRIT

### A

Review should be granted because there is presented a matter of major concern to the integrity of the Federal Judicial procedure.<sup>1</sup> This is not merely a decision on an important question of local law in probable conflict with applicable local decisions, but it goes much deeper than that. It is a question of an unlawful invasion by the Federal Court of petitioner's constitutional right to have the State law declared and applied. The Circuit Court in basing its decision on general law and in failing to declare the local State law in issue has failed to apply the authoritative rule established by this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 Law Ed. 1188, which is to the effect that the local State law governs and that a Federal Court in entering judgment based on general law when applicable local law is put in issue and asked to be declared invades the "rights \* \* \* reserved by the Constitution to the several States."

### B

Review should be granted to the end of placing a

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<sup>1</sup> The Business of the Sup. Ct. Harv. L. Rev. 238, 274.

final interpretation upon Rule 52 (a) of the Federal Rules of Civil Procedure, which provides:

“In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusion of law thereon and direct the entry of the appropriate judgment; \* \* \*

This Court should declare whether that rule is mandatory upon the District Court to find the facts specially and state separately its conclusions of law thereon. There is now a conflict of interpretations placed upon the rule by several Circuit Courts of Appeal. The Ninth Circuit by its decisions in this action in attempting to supply essential facts (wanton negligence) upon vital issues which were left unresolved by the lower court is in conflict with *Bowles v. Russell Packing Co.*, 140 F. (2d) 354 (CCA 7), and *Brown v. Quinlan, Inc.*, 138 F. (2d) 228 (CCA 70), *Ordinary of State of New Jersey v. United States Fidelity & Guaranty Co.*, 136 F. (2d) 537 (CCA 3), and *Wessel, et al, v. Seminole Phosphate Co.*, 13 F. (2d) 999 (CCA), in which it was held,

“The ultimate facts in issue are not covered by the findings, this Court cannot supply them from evidentiary matters found, but must remand the cause for a new trial.” Citing cases.

It would seem that a review by this Court is neces-

sary in the interest of orderly appeals. For instance, in this case the appeal to the Circuit Court of Appeals because of a lack of findings of fact and conclusions of law, Petitioner had to brief several different theories which the District Court may or may not have had in mind. If the District Court had made proper findings as requested, it would have been possible to raise questions of the sufficiency of the evidence to support such findings. In the absence of the findings, the petitioner was left in the dark and consequently had to shoot in the dark.

### C.

Review should be granted because of the unusual procedure followed by the Court below. Ordinarily it would not be suggested that this Court grant certiorari for insufficiency of evidence to support the judgment; however, it is the first opportunity petitioner has had to raise the question of the insufficiency of evidence to support the conclusions reached by the Circuit Court of Appeals that petitioner was guilty of "wanton" negligence. Such new factual point and legal conclusion drawn therefrom originates in the opinion of the Circuit Court of Appeals, and Petitioner has never had an opportunity to meet the question nor present the Oregon law as to what constitutes "wanton" negligence.

Both courts were derelict of their judicial duties in

failing to declare the Oregon law and in ignoring the essential facts in issue, and the conduct of the Circuit Court in upholding the judgment on the so-called general law from the one case from the State of Washington and a general statement from the Restatement of Torts in the light of this Court's ruling that local state law must be declared and applied would seem to present a situation which should be reviewed and corrected by this Court. All the more so because the Washington case referred to and the general statement from the Restatement of Law deals with a situation which is foreign to and not in point with the factual situation here. Our facts deal with a broken wire that fell without notice or knowledge to the Petitioner. The Washington authority and the quotation from the Restatement of the Law of Torts applies to a situation where the owner or possessor of premises himself creates or maintains a concealed dangerous condition at a place upon his premises which to his knowledge is likely to cause death or serious injury to trespassers. Note that it requires actual "knowledge" of the dangerous condition, which of course a person would have where he himself constructs or actively maintains such dangerous condition; whereas, here the dangerous condition was unknown to petitioner. It did not create or maintain a dangerous condition; it had no knowledge that the wire was down (R210), and Respondent's

expert witness testified there was not enough arc between wire and brush "to fill up their breakers at the plant" (R 101), which would have cut the circuit. Now, if the circuit had been cut through, a ground or short on the line, and Petitioner knowing that a wire was down had thrown the circuit breaker back into place and re-energized the line, that would be something else again, but it is not present here. The situation here falls within the so-called "broken wire cases" on privately owned premises, and the Circuit Court therefore not only failed to declare the Oregon law but misapplied the so-called foreign law.

WHEREFORE, your Petitioner prays that Writ of Certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit to the end that this matter may be reviewed and be determined by this Court as provided by the statutes of the United States, and that the judgment of said Circuit Court be reversed, and for such further relief as to this Court may seem proper.

Respectfully submitted,

JAMES ARTHUR POWERS,  
DEAN A. DICKINSON

*Counsel for Petitioner.*

R. A. IMLAY *of Counsel.*

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**Brief in Support of Petition  
for Writ of Certiorari**

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**PRELIMINARY STATEMENT**

The opinion of the Circuit Court of Appeals for which review is sought appears in the Record is at Page 269. The summary "statement of the matter involved" set forth in the foregoing petition for Writ of Certiorari contains all that is material, as a "statement of the case" for consideration of the questions presented, and in the interest of brevity, it will not be repeated here.

## JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U.S.C.A. 347). The Circuit Court of Appeals has decided an important local question, basing its decision upon general law and neglecting to declare the local law in issue, and further, the Circuit Court of Appeals by its decision has sanctioned a departure from the accepted and usual course of judicial proceedings by the lower court to such an extent as to call for an exercise of this Court's power of supervision. For these reasons and for the reasons set forth in petitioner's jurisdictional statement in its foregoing petition, which by reference is incorporated herein, Petitioner submits this Court has jurisdiction.

## SPECIFICATION OF ERRORS

### I

The Circuit Court erred in failing to declare the Oregon law in issue and in upholding judgment allowing plaintiff to recover for death of deceased person who under the Oregon law was at most a mere licensee.

### II

The Circuit Court erred in failing to reverse District Court for its failure to declare the legal relationship of

the parties and its failure to declare the status of deceased on premises where accident occurred, and its failure to declare what legal duty defendant owed to deceased.

### III

The Circuit Court erred in failing to reverse District Court for its failure to comply with Rule 52 (a) of Federal Rules of Civil Procedure.

### IV

The Circuit Court erred in that there is insufficient evidence under the Oregon law to support the conclusions of said Court and particularly the conclusion that petitioner would be liable even if deceased "was a technical or other kind of trespasser" on its property, and the conclusion that petitioner was guilty of "wanton" negligence, and the conclusion without any evidence to support it that other persons owned property under petitioner's power line.

### POINT I

The Circuit and District Courts erred in failing to declare the Oregon law in issue and in upholding judgment allowing plaintiff to recover for death of deceased person who under the Oregon law was at most a mere

licensee. In Oregon one who goes upon the premises of another merely "by permission or toleration" is termed a "mere licensee" to whom "the owner of the premises owes no greater duty than to avoid wilful or wanton injury to the licensee".<sup>1</sup>

## ARGUMENT

The lower courts here have refused to decide the local law. It is not a case of misapplying the local law; it is a case of refusing to decide what the local law is. The relationship of the parties must be determined in order to know what principle of law applies. The status of deceased is left undecided, yet her status is the basis which must be used to determine the rights and liabilities of the parties. The Circuit Court thought she might have been a trespasser. The District Court says deceased was not a trespasser, but how could any court know whether deceased was a trespasser without knowing whose property she was on. Obviously neither could determine what her status was on the premises without knowing whose premises the accident occurred on. Neither court goes far enough; they both leave undecided her actual status. Was she an invitee? Was she a licensee?

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<sup>1</sup> The leading Oregon case is *Lange v. St. Johns Lumber Co.*, 115 Or. 337; 237 Pac. 696—which together with other Oregon authorities down to date establishing the same point are brief herein under Point II.

To hold that she was an invitee would be in conflict with Oregon law; to hold she was a licensee requires a showing of "wilful or wanton" injury under the Oregon law, and hence no liability under the facts here. The District Court, although specifically requested to do so, neglected to say what degree of care was required. It merely said Petitioner was held to "due care." Obviously "due care" is an indefinite phrase, and it fails to give any definite yardstick for measuring liability. For instance, if deceased was a licensee, "due care" would mean simply to refrain from "wilful or wanton" injury, whereas, if deceased was an invitee, petitioner would be held to the duty of exercising "ordinary care" for her safety. As an example, under the Oregon Guest Statute "due care" would not be "ordinary negligence" but would be gross negligence. If the Court meant "ordinary care" there is no evidence to support such legal conclusion in the absence of a finding determining decedent's status and a further finding that the accident occurred on the premises of some third party. The Oregon law establishing the foregoing statements is briefed under Point II herein.

This Court has held that Federal Courts must declare and apply the local state law in a case involving the very same questions presented here; namely, whether liability can be imposed in a Federal Court on a defendant under general law for ordinary care, where his own

state has a rule merely to refrain from "wilful and wanton" injury.<sup>2</sup> That Federal Courts in applying general law invade "rights which \* \* \* are reserved by the Constitution to the several states." Petitioner in its briefs below contended that the Oregon law controlled.<sup>3</sup>

There is a complete hiatus in this case between the facts and the law. Neither the Circuit Court nor the District Court would declare the law presented to it. The point involved here is of great importance in the State of Oregon and the procedure followed by both courts below displays either a gross misconception of the Erie decision by this Court or a disinclination to follow it—tremendous fundamental rights are involved and this Court should exercise its power of supervision by granting review.

## POINT II

*The foundation of tort liability must be based on the legal relationship of the parties. In order to determine*

<sup>2</sup> Erie v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188.

<sup>3</sup> We quote from Petitioners' brief in Circuit Court, page 22:

"Under the decision of Erie Railroad v. Tompkins,, 304 U. S. 64, 82 L. Ed. 1188, the Oregon law is to be applied here, and we therefore do not rely on decisions from other jurisdictions." And page 13: "we deal here with the law of Oregon respecting what duty of care is imposed upon a property owner to a licensee or trespasser, and we show herein that its duty is the same whether a person be licensee or trespasser and whether the injury is from a charged electric wire or through some other dangerous condition on the owner's premises. The Supreme Court of Oregon has stated the law respecting both situations. The leading case in Oregon is Lange v. St. Johns Lumber Company, (115 Or. 337), 237 P. 696, in which the Court defines the difference between an invitee and a mere licensee and holds that in order to be an invitee there must be some mutuality of interest shown, \* \* \*."

*the legal relationship of the parties, it is necessary here to know two things: (a) on whose property the accident occurred, and (b) the status of deceased on that property. The judgment here should be reviewed because until these questions are answered, it is impossible to declare the applicable law. The Circuit Court in upholding the judgment has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. (Sup. Ct. Rule 38 (b) )*

## ARGUMENT

The relationship of the parties is a pivotal question in this case. The status of decedent at the place where the accident occurred calls for one principle of law if she was an invitee, and a different principle of law if she was a licensee or trespasser. The uncontradicted evidence is that decedent was there solely for her own pleasure, that she had no business or mutual interest with Petitioner; that she was not invited there by Petitioner. Under these facts, if the accident occurred on Petitioner's property, the Oregon law is that decedent at best would be a **MERE LICENSEE.**<sup>1</sup>

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<sup>1</sup> Page references are to Oregon reports:

(Page 343): "There is a difference between one present on premises by an invitation, express or implied, and one who is merely there by permission or toleration. The one is termed an invitee and the other mere licensee. As to the former, the owner of the

Respondent undertook by the theory of his complaint, as incorporated in the Pre-trial Order and by the testimony produced at the trial, to establish that the place of the accident was on property owned or controlled by some third party (R 137, 138). His proof totally failed, and the District Court stated it was unsatisfied with the proof and expressly refused to make a finding of fact that the place of the accident was on some third party's property.<sup>2</sup> Under the Oregon law, this was error, because the plaintiff failed to establish the essential element in his case.<sup>3</sup>

We deal here with the law of Oregon respecting what duty is imposed upon a property owner to a licensee or trespasser, and we show herein that the duty is the same whether a person be licensee or trespasser and whether the injury is from a charged electric wire or through some other dangerous condition on the owner's premises. The Oregon Supreme Court has stated the law respecting

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premises is bound to use reasonable care to prevent the infliction of hurt upon the invitee: *Keeran v. Spurgeon Mercantile Co.*, 194 Iowa, 1240 (191 N. W. 99, 27 A.L.R. 579). As to the latter, *the owner of the premises owes no greater duty than to avoid willful or wanton injury to the licensee.*" (*Lange vs. St. Johns Lumber Co.*, 115 Or. 337 (237 Pac. 696), P. 343 (Or.)) (*Emphasis ours*)

<sup>2</sup> R 252, 253:

"The Court does not find evidence enough in the record to determine whether or not this wire lay upon property of the defendant or upon property owned by some other person, . . ."

"I would answer the question squarely, if I thought I could, but from the evidence I don't think it can be, and I won't make a finding against the defendant."

And the Court to Respondent's attorney (R. 257);

"The Court: No, you are trying to make me find on one side or the other, and I do not think the evidence is sufficient to find one way or the other."

<sup>3</sup> Plaintiff had burden of proof under authorities briefed—but District Court likewise failed to determine this question although raised in Pretrial order.

both situations. The leading case in Oregon is *Lange v. St. Johns Lumber Company*,<sup>1</sup> Supra, in which the Court defines the difference between an invitee and a mere licensee and holds that in order to be an invitee there must be some mutuality of interest shown. The Oregon Court in deciding the question quotes with approval from numerous decisions from other jurisdictions in support thereof.<sup>4</sup>

The Oregon Supreme Court holds the same doctrine applies to a broken electric wire such as we have in the instant case.<sup>5</sup> That was an action against an electric company in a **BROKEN WIRE** case for damages re-

<sup>4</sup> In the *Lange* case the Oregon Court quotes with approval P. 345 Oregon Reports:

"It is well settled there that to come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant."

The Oregon Court in support of its decision states (P. 344): "In *Vanderbeck v. Hendry*, 34 N.J.L. 467, the Supreme Court held that mere permission to pass over dangerous lands, or an acquiescence in such passage for the benefit or convenience of the licensee, creates no duty on the part of the owner except to refrain from acts willfully injurious. The premises on which the injury in that case happened were private grounds, used for a lumber yard, on which lumber was piled, leaving passageways between the piles for the convenience of loading and unloading. The yard was not enclosed and persons were in the habit of passing through these gangways to go from street to street. The plaintiff, out of curiosity, went into one of the gangways and was injured by the falling of a pile of lumber which had been piled in a negligent manner. The court held that an action for such injury could not be maintained; that mere permission, or passive license to enter upon lands, relieved a person entering premises from the responsibility of being a trespasser, but that he enjoyed the license, assuming the ordinary risks of the nature of the place and the business carried on upon it. \* \* \* All that may be said in favor of a mere licensee is that he is only not a trespasser, and the general rule of law is that the owner and occupier of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees and others who come upon the premises for their own convenience or pleasure, however innocent their purpose may be."

<sup>5</sup> *Kesterson et al v. California-Oregon Power Company*, 114 Or. 22 (228 Pac. 1092) (P. 25, Oregon Reports): "On demurrer to the complaint, wherein both the instruments appear as exhibits, the defendant maintains that in placing his lumber on the right of way as created by the writing of May 2, 1912, Kesterson was a trespasser to

sulting therefrom. The Plaintiff there sought to recover on grounds of ordinary negligence. The Court, after considering the relationship of the parties in order to determine what duty, if any, defendant owed to plaintiff, held there was no duty other than to avoid "wilful or wanton" injury.<sup>6</sup>

The Lange case, *supra*, is still good law in Oregon and is followed down to date.<sup>7</sup> The Lange case has like-

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*whom, or to whose property, the defendant owed no duty further than to avoid the infliction of wilful or wanton injury and that, as the complaint does not charge such a tort, it does not state facts sufficient to constitute a cause of action."*

The Court in sustaining the demurrer states (P. 29): "The analogy is strong between high-powered electric lines and railway tracks as places of danger and the necessity of their operators being allowed exclusive control of them. The reason of the rule is the same in both instances. The principle is illustrated by the following extract from the opinion of Mr. Chief Justice Lord in *Ward v. Southern Pacific Co.*, 25 Or. 433 (36 Pac. 166, 23 L.R.A. 715, 60 Am. & Eng. R. Cas. 34 12 Am. Neg. Cas. 516): 'The track is the private property of the company, and was not built to be used as a highway for pedestrians. Being intended for the sole use of the company, except at public crossings, the law will not sanction its use as a footpath. Nor will the fact that people may have frequently used the track to walk on change the law, or render their act less unlawful. \* \* \*'"

- <sup>6</sup> (P. 30): "They do not claim any license or permission from the defendant to occupy the latter's right of way with stacks of lumber; neither do they claim that the defendant wantonly, willfully or maliciously set fire to the lumber or the buildings. What then is trespass? 'Every unauthorized entry on land of another is a trespass even though no damage is done, or the injury is slight.' 38 Cyc. 995. In *Wilmot v. McPadden*, 78 Conn. 367 (65 Atl. 157, 19 L.R.A. (N.S.) 1101), Mr. Justice Hamersly thus enunciates the doctrine about who are trespassers and the duty of the land owner towards them:

"The owner or tenant of land has the right of exclusive possession; whoever violates this right is a trespasser; and such trespasser assumes all risk of danger which is incident to the condition of the premises; as to him the owner does not owe the legal duty of exercising care in keeping the premises in a safe condition for his use."

- <sup>7</sup> *Napier v. First Congregational Church*, 157 Or. 110, 115, 70 P. (2d) 43, said:

"An invitation to use the premises of another is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using them." And again in *Briggs v. John Yeon Co.*, 168 Or. 233, the Court quotes with approval from 38 Am. Jur., *Negligence*, 759, Par. 99, as follows:

(Page 242): "'One is not deemed to have been upon premises by implied invitation unless his purpose was one of interest or advantage to the owner or occupant. An invitation will be implied on behalf of one who enters the premises of another in pursuance of an interest or advantage which is common or mutual to him and the owner or occupant, but no more than a license is implied where one enters the premises of another, not in response to any inducement offered by the owner or occupant,

wise heretofore been followed by the Federal Court for the District of Oregon.<sup>8</sup>

### POINT III

There is a complete failure to comply with the requirement of Rules 52 (a) that findings of fact be specially made and separate conclusions of law stated thereon. The requirements of Rule 52 (a) of Federal Rules of Civil Procedure cannot be utterly ignored, and the Ninth Circuit in failing to enforce the rule has created a conflict with other Circuits which should be settled.

### ARGUMENT

Review should be granted because there has been a serious departure from the accepted and usual course of judicial proceedings by the Circuit Court of Appeals in its own consideration of this case, and it has sanctioned such a departure by the lower court as to call for an exercise of this Court's power of supervision. The District Court in neglecting to make a finding as to the relationship of the parties and refusing to find the status of the deceased on the premises where the accident occurred not only left unresolved the basic factual issue but left the case in the position where the local applicable law

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or for a purpose having some connection with a business actually or apparently carried on there, but for his own mere pleasure, convenience, or benefit.'"

<sup>8</sup> The Sudbury, 14 Fed. (2), 533, Decision by Judge Bean. "A licensee enters upon the premises of another at his own risk, and he takes the premises as he finds them, and the owner owes no duty to a mere naked licensee to keep the premises in a certain condition for the benefit of such licensee."

could not be decided. In short, the District Court entered judgment without determining the basic issues of either law or fact. This we submit is contrary to Rule 52 (a)<sup>1</sup> of the Federal Rules of Civil Procedure; it is a departure that gives rise to the very confusion that Rule 52 (a) was designed to guard against. When a Court sits both as judge and jury, it would be a dangerous step backward to permit such court to enter judgment upon personal undisclosed notions. If this is permitted, an orderly, effective appeal is impossible. The Ninth Circuit by its decision here has declined to follow interpretations by this Court respecting Rule 52 (a) and of other analogous rules designed to serve the same purpose; also its decision is in conflict with other circuits.

This Court in an analagous situation has declared that a litigant is entitled to a "fair compliance with the requirement of Rule 52 (a)," and further points out that such compliance is of the highest importance to an appellate court in order to have a proper review.<sup>2</sup>

Again in *Paramount Pictures Distributing Company v. United States of America*, 304 U. S. 55, 82 L. Ed.

<sup>1</sup> Rule 52. Findings by the Court. "(a) EFFECT. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; \* \* \*"

<sup>2</sup> *Mayo v. Lakeland Highlands Canning Co.*, 309 U. S. 310, 84 L. Ed. 774:  
 "It is of the highest importance to a proper review by the United States Supreme Court of the action of a Federal District Court in granting or refusing a preliminary injunction against the enforcement of a state statute that there should be fair compliance with the requirement of Rule 52 (a) of the Rules of Civil Procedure with regard to the separate statement of findings of fact and conclusions of law." (Syllabus 3, p. 775, 84 L. Ed.)

1146, this Court, dealing with the equity rule which has the identical requirement that "the trial Court shall find the facts specially and state separately its conclusions of law thereon," in reversing the lower court's decree remanded the case, directing it "to state its findings of fact and conclusions of law" as required by the Rule.<sup>3</sup>

In *Beaumont Sour Lake & Western Railway Co., et al, v. United States of America, et al*, 282 U. S. 74, 75 L. Ed. 221, in considering an Interstate Commerce Commission case, this Court points out that the Commission has the same duty "specifically \* \* \* to report the facts and give the reasons" for its conclusions as has the lower courts, to the end that the grounds be known upon which they act.<sup>4</sup>

In *United States of America Interstate Commerce Commission et al, v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, et al*, 294 U. S. 499, 79 L. Ed. 1023, Justice Cardozo points out the necessity for a

<sup>3</sup> (P. 1147, 82 L. Ed.):

"The Court did not find the facts specially and state separately its conclusions of law as the rule required. The statements in the decree that in making the restrictive agreements the parties had engaged in an illegal conspiracy were but ultimate conclusions and did not dispense with the necessity of properly formulating the underlying findings of fact.

"The opinion of the Court was not a substitute for the required findings. A discussion of portions of the evidence and the Court's reasoning in its opinion do not constitute the special and formal findings by which it is the duty of the Court appropriately and specifically to determine all the issues which the case presents."

<sup>4</sup> (P. 230, L. Ed.):

"Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower Court setting for the reasons on which they base their decisions in cases analogous to this. *Wichita R. & Light Co. v. Public Utilities Commission*, 260 U. S. 48, 58, 67 L. Ed. 124, 130, 43 S. Ct. 51. And we have recently emphasized the duty of such Courts fully to state the grounds upon which they act. \* \* \*"

finding of fact upon which an ultimate conclusion is based.<sup>5</sup>

The Fourth Circuit opinion by Parker, J., points out the requirement for finding on every material issue and for failure to comply holds the case must be remanded.<sup>6</sup>

The Seventh Circuit in the recent case of *Bowles v. Russell Packing Co.*, held in a matter dealing with an interlocutory injunction that a fair compliance with Rule 52 (a) relating to findings of fact and conclusions of law is mandatory.<sup>7</sup>

The Third Circuit, remanded for findings.<sup>8</sup>

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<sup>5</sup> (L. Ed. p. 1029):

"The statement in the second of these paragraphs that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated."

(L. Ed., p. 1032): "We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. \* \* \* The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. \* \* \* We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

<sup>6</sup> *Wessell, et al, v. Seminole Phosphate Co.*, 13 F. (2d) 999:

"These are the ultimate facts upon which the case turns, and there has been no sufficient finding with respect to them to justify the Court in declaring as a matter of law that there has or has not been a breach or a rescission by mutual consent. \* \* \* Where the ultimate facts in issue are not covered by the findings, this Court cannot supply them from evidentiary matters found, but must remand the cause for a new trial."

<sup>7</sup> 140 F. (2d) 354 (p. 355): "We think it proper to insist at all times upon fair compliance with Rule 52 (a). The ends of justice and orderly procedure will best be served by remanding the case to the District Court, with directions to make findings of fact and state its conclusions of law thereon."

<sup>8</sup> *Ordinary of State of New Jersey v. United States Fidelity & Guaranty Co.*, 136 F. (2d) 537: "After argument and examination of the briefs and appendices in this appeal, we are of the opinion that it is impossible to decide the issues presented without findings of fact by the Court below. *Hazeltine Corporation*, 3 Cir., 131 F. (2d) 34; *Clarke v. Gold Dust Corp.*, 3 Cir. 91 F. (2d) 12. Accordingly the judgment is reversed and the cause is remanded in order that the Court below may have the opportunity to make findings of fact and conclusions of law as required by Rule 52 (a)."

The Seventh Circuit, reversed because judgment denying injunction was not based on proper findings.<sup>9</sup>

The Third Circuit in *Hazeltine Corporation v. General Motors Corporation* is indefinite about the rule.<sup>10</sup>

The Congress has given this Court the power to make uniform rules for the Federal Courts, and the rules should be uniform in all circuits. This Court should place a final interpretation upon Rule 52 (a) and settle the apparent conflict which is developing between the circuits. Is the rule mandatory or not? Can a valid judgment be entered where the rule has been ignored? The decision here by the Ninth Circuit Court, which acquiesced in noncompliance of the Rule by the District Court, conflicts with the decisions *supra* from the Seventh and Fourth Circuits, and possibly with the decisions from the Third Circuit. There is a conflict because the Ninth Circuit not only sanctioned noncompliance of the Rule by the District Court but supplied factual issues itself in reaching its conclusion; in respect to the supplying of

<sup>9</sup> *Brown v. Quinlan, Inc.*, 138 F. (2d) 228 (p. 229):

"Obviously there was presented to the District Court a sharply drawn issue of fact going to the very essence of the complaint, namely, whether defendant had knowingly violated the regulations as charged. Upon the existence or non-existence of this fact depended almost entirely the propriety of the Court's disposition of the motion. Under Rule 52 (a) of the Federal Rule of Procedure it is the trial Court's duty to make findings of fact and conclusions of law."

<sup>10</sup> 131 F. (2d) 34: "The failure of the trial judge to comply literally with the provisions of Rule 52 (a), although it has been characterized as a 'dereliction of duty' is not always the ground for reversal and remand with instructions to make specific findings as required by the Rule. The latter course of action has been adopted where there was an inadequate statement of facts upon vital issues and where such factual issues were not resolved." (Citing cases)

facts to sustain the judgment. The Ninth Circuit appears to be in absolute conflict with the other circuits.

#### POINT IV

The Circuit Court erred in that there is insufficient evidence under the Oregon law to support the conclusions of said Court and particularly the conclusion that Petitioner would be liable even if deceased was "a technically or other kind of trespasser" on its property, and the conclusion that petitioner was guilty of "wanton" negligence, and the conclusion without any evidence to support it that other persons owned property under petitioner's power line.

#### ANALYSIS OF CIRCUIT COURT OPINION

The Circuit Court states:

"The Court below rightly concluded that other persons as well as appellant owned land or mining claims in the Canyon under Appellant's transmission line; • • •"

Such statement or finding is entirely unsupported by evidence. The only part of petitioner's land that was brought into question and covered by the surveys was the land in Red Jacket Canyon under petitioner's electric line where deceased was found. The District Court refused to find who owned this land. Without a finding

as to the ownership of the land, there is no basis for the Court to suggest that third parties own land under Petitioner's electric line. That is the question involved in this case. The Court at one place refuses to decide who is the owner and at another place concludes other persons "owned land" in the "Canyon under Appellant's transmission line" and in doing so directly contradicts itself; it makes no sense whatever and verges upon what is known as a "Goldwynism," i.e., "include me out," etc.

Again the Circuit Court states:

"that if the place where decedent came in contact with the wire was not on the mining claim of third parties such place was extremely close to the boundary line of (petitioner's) mining claim and at most within a few feet of the boundary line between the mining claims of (petitioner) and third parties."

The Court refused to find that the accident occurred off Petitioner's property as contended by Respondent, and the only other testimony was that the point of the accident was 85 feet inside Petitioner's property line. The Petitioner's power line at the point where this accident occurred is either on or not on its own property, and there should be no equivocation respecting this fact. The lower court in refusing to find the fact stated it would get around it by saying it was close to the boundary line "maybe within a few feet." The accident either occurred on the property

of some third party, or on the property of Petitioner and inside Petitioner's property line a distance of 85 feet.

The Court's statement amounts to nothing more than the accident may have happened on Petitioner's property, but even if it did, it only happened a few feet on Petitioner's property. This tends to obscure the actual fact, which is that the accident either happened 85 feet inside Petitioner's property line, or it didn't happen on Petitioner's property at all. A clear-cut issue was presented and a clear-cut finding should have been made. The same can be said with respect to the Circuit Court's statement that:

"vacationers and others in pursuit of their business and pleasure customarily leave access roads and go at will across wild unfenced mountainous mining lands like those here in our own Northwest country, and that in so doing they are not usually regarded as trespassers by the owners of such lands."

This is something else that the Circuit Court has put in its opinion which leads nowhere—it has neither stem nor root. The question is asked respecting the foregoing statement, what of it? Does it give an answer to the legal problem. Obviously not. The Circuit Court might have declared the law respecting such a situation as it was requested to do in the appeal below, and declare what the status of such persons would be. In Oregon people

who go on unfenced lands even with the owner's knowledge are there as mere licensees. It is true people do go on other people's land for their own pleasure. They go hunting, berry picking, etc., but even when they do it with the owner's knowledge such persons in Oregon occupy the status of mere licensees, as to whom the property owner owes no duty except to refrain from "wilful or wanton injury."

Circuit Court's finding or conclusion that Petitioner was guilty of "wanton" negligence is wholly without support either in the evidence or in any finding of the trial court, and the judgment cannot be upheld on that ground. Likewise, there is no evidence that the deceased was an invitee on Petitioner's premises, and judgment cannot be upheld on that ground. Actually, what the situation amounts to here is a case being put in issue and tried upon the theory that the accident occurred on land of a third party and when that theory fell through the District Court adopted a different factual theory, namely, that the accident occurred near the boundary line of Petitioner's property and entered judgment without disclosing any legal principle or legal theory to support it; the Court may have had in mind that Petitioner should have anticipated that a person such as the deceased would be there "playing" or "looking for mushrooms." Assuming the Court had some such theory in mind, it was still incumbent upon it to de-

clare what status that gave to the deceased upon the premises; this is fundamentally necessary in order properly to determine what if any legal liability exists. We have shown *supra* that deceased even under such assumed facts is a mere licensee if she was on Petitioner's land. The Circuit Court entered judgment upon still a third theory, basing its ruling upon the theory and the assumed fact that the accident occurred on Petitioner's premises but that the Petitioner was liable because it was guilty of "wanton" negligence. Rule 52 (a) was promulgated to prevent this very kind of confusion. Both Courts ignored the rule and bypassed the controlling factual situation in refusing to declare the relationship of the parties and define the status of the deceased on the premises. The District Court, without passing upon the controlling factual issue, simply stated that the Petitioner was held to "due care" which means nothing in the absence of knowing the legal relationship of the parties. The Circuit Court of Appeals declared that Petitioner was held to the exercise of "ordinary care" and imposed upon Petitioner an active duty to keep its premises safe for deceased and others who might enter upon its premises for her or their own pleasure and without any business with or invitation from Petitioner; this is directly in conflict with the Oregon law.

In Oregon it is settled law that the words "wilful" and "wanton" are synonymous terms in a tort action. A wrong

that is committed in order to be "wanton" must be intentionally or wilfully done. Neither gross negligence nor a conscious indifference of duty is the equivalent of "wanton" negligence.<sup>1</sup>

It is respectfully submitted that this petition for certiorari should be granted.

JAMES ARTHUR POWERS and  
DEAN H. DICKINSON,

*Counsel for Petitioner.*

R. A. IMLAY *of Counsel.*

Dated.....

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<sup>1</sup> Lee v. Hoff, 164 Or. 374 (97 Pac. (d) 715) P. 389: "Conscious indifference does not amount to willful or wanton disregard of duty." Also Rauch v. Stecklein, 142 Or. 286 (20 Pac. (2d) 387, P. 293.

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No.-----

# **In the Supreme Court of the United States**

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**OCTOBER TERM, 1945**

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**CORNUCOPIA GOLD MINES,  
A Private Corporation,**

**Petitioner and Appellant,**

**vs.**

**CARL LOCKEN, Administrator of the  
Estate of Anna Locken, Deceased,**

**Respondent and Appellee.**

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## **Brief of Respondent and Appellee**

**In Opposition to Petition for Writ of Certiorari to  
the United States Circuit Court of Appeals  
for the Ninth Circuit.**

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We do not deem it necessary to review seriatim the contentions made by the petitioner in its petition here, nor to renew here the arguments and citations of authorities made in the Circuit Court of Appeals. These questions are run together in such form that it is difficult to segregate them, and before the Court could clearly understand them it would be necessary to read the entire evidence.

As we understand the rules of this Court, the Court will not go into the evidence upon this petition. We emphatically deny that either the Honorable James A. Fee, District Judge of long standing who tried this case without a jury, or the Circuit Court of Appeals for the Ninth District failed to apply any rule of law of Oregon either statute or as announced by the decisions of its courts that had any application to the facts involved. A clear statement of the facts concerned in this case and the findings made by the lower court which were concurred in by the Circuit Court of Appeals clearly shows that it was correctly held by the Circuit Court of Appeals that the law of Oregon involved in this case is in harmony with the general rule as stated in Restatement of the Law, 2 Torts, Section 355, pages 908-911, and in *Clark v. Longview Public Service Co.*, 143 Wash. 319, 255 Pac. 380, and cases there cited.

We submit that no authority submitted by appellant is in point on the facts involved in this case.

Summing the entire contentions of appellants in this case, the question is boiled down to merely one issue: Was it necessary for the determination of the case for the Court to try out the title to the land on the exact spot where Anna Locken met her death? The title was not at is-

sue in the pleadings and the court held correctly and made its findings to the effect that Anna Locken was not a trespasser on the land of the defendant when she met her death. This was supported by the overwhelming weight of evidence, as well as the law not only in Oregon but generally.

### **STATEMENT OF CASE—APPELLEE**

Owing to the fact that appellee controverts many statements made by the appellant in its statement of the case, and by virtue of arguments and mis-statements contained therein, appellee does not feel that the Court will have a true picture of the facts involved in this case before this Court on petition for writ of certiorari without an additional statement of the case and the facts involved as shown by the record. The important facts are substantially as follows:

This case was originally filed by Appellee in an Oregon State Court and on account of diversity of citizenship was removed by appellant to the Federal District Court. The case was tried by the Honorable James A. Fee, District Judge for Oregon, sitting without a jury. It is an action to recover by an administrator on behalf of himself as widower and the minor children of the deceased for the death of Anna Locken, as a result of her coming into contact with a live electric wire carrying 2300 volts, fallen from a transmission line

owned, operated and maintained by appellant, between Cornucopia, Oregon, and its' Union mine located westerly therefrom approximately  $1\frac{1}{2}$  miles through unfenced forest and mining territory. (T. 14-15, 41, 85.)

The town of Cornucopia is an old established incorporated town located on Pine Creek on the south slope of the Wallowa Mountains in Baker County, in Northeastern Oregon. The farming town of Halfway is located approximately 12 miles further down the valley. During the times that the mines in this district are operating the town of Cornucopia has a population of several hundred people; during the times that the mines are shut down the population dwindles.

The appellant has a mine at Cornucopia and operates a generating plant located at Cornucopia that supplies electric current not only for its mining operations but also for the town. A transmission line of the appellant corporation runs from the town to its' Union mine. About one-fourth mile from the town this transmission line crosses a canyon known as the Red Jacket Canyon. The transmission line is suspended across this canyon for a distance of approximately 504 feet from poles from each side of the canyon. (T. 15, 161-162).

On the 20th day of May, 1942, and for several months prior thereto, the mines of the appellant

corporation were shut down and its' only employees at Cornucopia and its mines were watchmen, none of whom were licensed or experienced as electricians. (T. 40-41, 85-86, 232-238). Its' generating plant, however, was operating and its' transmission lines carried current for the town and for heat to keep the motors dry. The current between these two mines was continuously left on after the closing of the mines, namely, November 1, 1941, up until the date of the death of Anna Locken.

The most southerly wire of appellant's transmission line had come loose from its' splice near the support on the west side of the canyon and had fallen in brush in and across this canyon but was still energized. (T. 15, 43-44, 55, Ex. C.)

On the 20th day of May, the appellee's decedent, Anna Locken, and her mother, Mary Myers, left the residence of Mary Myers at Cornucopia and started out for a walk and to look for mushrooms. (T. 77).

A road leading in the direction of and to appellant's Union mines runs out of the town of Cornucopia to the west and crosses the mouth of Red Jacket Canyon approximately 200 feet below the place where appellant's transmission line is suspended across the canyon. (T. 16) This is not a private road of the appellant and the land over which this road crosses from the town of Cornuco-

pia to the Red Jacket Canyon is on land not owned by the appellant and it is not claimed by the appellant that they have any right of way thereon and said road is used by other miners operating their claims in this mining district between the appellant's Cornucopia mine and its' Union mine. (T. 194 and 195, 197-198) Mr. Dunn, appellant's witness testified:

"Q. Is the road on Cornucopia property?

A. Not all the way.

Q. Well, up to where this accident occurred, where is it?

A. The road doesn't hit Cornucopia property until about where the accident occurred, until it hits the Coup D' Or claim."  
(T. 197-198)

"Q. Now, there are other claims, miner's claims, up past the Cornucopia mine, aren't there?

A. Yes, sir.

Q. They use that road, don't they, going back and forth to their mines?

A. Certainly." (T. 194)

That said road and said Red Jacket Canyon and vicinity and the place where Anna Locken was killed was freely travelled and used by the citizens of Cornucopia and the public generally and included mushroom and berry hunters. (T. 52, 84, 155)

The land in Red Jacket Canyon, as well as all other lands between Cornucopia and the Union mine is unfenced land and is mostly public domain

or national forest. (T. 49, 15, 92) Near the mouth of the canyon where the road crosses said canyon some of the land has been located as mining claims. Two claims belonging to one Richard Perry and associates are located at the mouth of the canyon. One of said claims extends north up the canyon across the road herein mentioned beyond the point where the decedent, Anna Locken, was electrocuted, and also extends westerly for a distance of approximately 6.88 feet to 10 feet from where she was so electrocuted. Anna Locken was electrocuted on this property. (T. 141-142, 152-154 incl.) These claims had been worked at two different places and a path or trail connects the two workings. (T. 157) These claims are sometimes known as the Very Fair and Very Hard respectively. (T. 159) West of the Perry claim known as the Very Fair the appellant corporation has a patented claim known as the Coup D' Or. There is nothing to mark or indicate the line between the Perry claim and that of the appellant corporation. None of this land in the Red Jacket Canyon under its' transmission line had been in possession of or operated by the appellants but said land at the mouth of said canyon and up and beyond said transmission line for many years had been possessed by Perry and others under their claim rights. Their possession and claim of ownership was open, visible, notorious and undisputed.

(T. 153-154)

As Anna Locken and her mother reached Red Jacket Canyon along said road, Mrs. Myers stopped to take some rocks from and repair a ditch carrying water from said canyon across said road into what is known as Elk Creek which flows into Pine Creek. Anna Locken continued up said road for a short distance and turned off on or near the trail used by Perry and associates upwardly along said canyon for a distance of approximately 200 feet where she was electrocuted by said wire lying across said trail near the ground and concealed in brush of similar size and color. (T. 78-9, 43, 158) There was no trespass signs and no warning signs of any kind or nature on any of this land at or near the Red Jacket Canyon, or between the town of Cornucopia and said Red Jacket Canyon, excepting there was a sign stretched high across this public road that led to Red Jacket Canyon at a point where it intersects a street of Cornucopia warning of trucks that were using this road. No trucks had been on the road for many months, which was well known to Mary Myers when she and her daughter entered that road. (T. 43, 80, 68, 70) The canyon from the place where it reaches Elk Creek up to and beyond the transmission line for some distance is, as hereinbefore stated, comparatively level and is covered principally with brush and grass. (T. 157-8)

Appellant on page 4 of its Petition states: There had been no previous break in the wire up to the time of the accident, and cites (T. 231). The testimony is as follows:

“Q. Is this the only trouble you have had with the wire ever **breaking right there**, is that right?

A. That is the only trouble **I had had.**” Italics are ours)

There was no testimony that the line had not broken elsewhere. Elmer Benham, the only electrician who testified in this case, in this respect testified substantially as follows: That the three wires between the poles next adjoining this tower on the west from where this fallen wire came loose each contained two splices. (T. 125) That this wire was of the same size as that which crossed the canyon. (T. 125) He further testified as an expert from the appearance of plaintiff's Exhibit C which is a picture of this transmission line wire where the same became disconnected by breaking as claimed by appellant or by pulling loose from a defective splice as claimed by appellee substantially as follows: That they had tried to make a messenger splice, which he indicates had not been made and that the wire had slipped from this splice; that the connection should have been made with a sleeve with a wire of that size and on which that much strain would be across the canyon. He described

such a sleeve as one with "ferra" connections and that if a sleeve was not used that the wire should have been welded instead of spliced. (T. 106-7, 117, 124) Mr. Benham had inspected this line from the defendant's generating plant in Cornucopia to the Union mine and the line where it is accessible from the road. (T. 101, 110) He testified in his opinion that the wire was too light that spanned this canyon, that they should have put in more poles down in the canyon or have supported the wires across the canyon with a heavy messenger, and described the messenger as being an extra cable that carries no energy, properly insulated from the poles, to support the weight of the wire in the center by insulated material. (T. 108) That on that hard drawn **wire** and the poles that were there, if they were spanning 300 feet it would be plenty on account of the wind storms they have there. (T. 114)

He further testified that the brush in the canyon where the body lay contained many burns; that by laying in the brush and not on the ground an arc is caused that goes directly into the ground but not enough to fill up the breakers down at the plant. (T. 100-101, 123) This latter testimony clearly indicated defective construction and maintenance and the fact that the wire was down a considerable length of time prior to the death of Anna Locken. Mary Myers' testimony as to radio

interference prior to the death of her daughter is also circumstantial evidence to the same effect.

On page 6, appellant's Petition, complaint is made that the Court did not find what, if any, legal duty was owned by the defendant to the decedent. This is not correct. The Court in its findings found that the plaintiff had established his case against defendant and the Court concluded from these facts:

"That the defendant corporation owed to Anna Locken the duty of due care, and her death was the proximate result of defendant's carelessness, negligence, and recklessness, and its failure to exercise due care for the safety of Anna Locken." (T. 32, Conclusion II)

Appellant further complains on page 6 of its' Petition, that the Court failed to pass upon the question as to who owned the property at the place where the accident occurred and which party had the burden of proving ownership of this property. The Court did not deem it necessary as shown by his remarks, to try out the fine niceties of title at the exact spot where the body was lying but did find:

"That on said 20th day of May, 1942, Anna Locken was lawfully walking in said canyon at or near the boundary line of a mining claim owned by said corporation and a claim owned by third parties, and came in contact with said charged electric wire of said defendant's power line that had been allowed to fall and remain down in said canyon." (T. 27, No. IX)

"That a general travelled road crosses the canyon near the point of said power line crossing; that a portion of the land in said canyon has been located as mining claims by various persons, including some owned by defendant corporation, but the boundaries of said claims are unmarked and could only be discovered by means of a careful and proper survey, and the land in said canyon and at and near the place where Anna Locken met her death, had for many years prior thereto, been crossed and travelled by the public generally without objection from anyone, and no danger or warning signs whatsoever, at or prior to the time of the death of Anna Locken, were placed at or near any of said properties in said canyon." (T. 26-27, No. VIII)

The Court further found:

"And the nature of the ground in said canyon at and near the place where said wire was lying near said ground in said brush, said fallen wire virtually constituted a trap for anyone walking or travelling in said canyon, and was a condition that any reasonable person operating and maintaining a charged power line would know was liable to cause the death or injury of anyone coming into said canyon, regardless of what land they were on." (T. 28-29)

But the crux of the Court's findings on this point is as follows:

"That there was no proof that Anna Locken was a trespasser upon the land of defendant at the time of her death." (T. 28, No. IX)

The title of the lands at the exact spot of decedent's death was not an issue in the pleadings but the appellant did claim that Anna Locken was a trespasser. The Court clearly found that the de-

cedent, Anna Locken, used due care for her own safety and that she was not a trespasser.

It appeared to us that the appellant had taken the position at and during the time of trial that no matter whose land Anna Locken was upon, she was a trespasser. The Court clearly found and concluded, we think, by the undisputed authority of this state and generally, that if Anna Locken was not upon property owned by the appellant, under no circumstances could she be regarded as a trespasser. It was immaterial whether she was on land of Perry and associates or United States Government or other third parties.

The Court further found:

"That the said Anna Locken was not a trespasser in entering into and upon said lands at the place where she met her death in coming in contact with said charged electric wire." (T. 31, No. XIII)

The misstatement is made on page 6 in effect that when the Court found that under the Oregon law plaintiff had the burden of proving the ownership of the land where the death occurred it changed its view that whoever had the burden of proving ownership would lose and got around it by saying that the accident happened close to the property line. As shown by the quoted statement of the Court on page 6 of this petition the court said in effect that whoever had the burden of proving lost out on that particular point and then found

that this question was raised under the appellant's affirmative defense and that the burden was on the appellant and it had failed to carry that burden and establish its defense. The District Court correctly held that the defense had the burden of proving its affirmative defense of "contributory negligence by trespass in the face of numerous warning signs of danger", and that the appellant had failed to establish this defense. That appellant had the burden in this defense we believe is borne out under the statutes and decided cases of Oregon.

(Ante, page-----)

The lower court found that plaintiff had established all the material allegations of his amended complaint and as agreed in the pre-trial order and these findings were supported by the overwhelming weight of the evidence. The Circuit Court of Appeals held that these findings were in accordance with the evidence and the law and that it was not necessary for the Court to try the title to the land at the exact spot where the accident occurred. As pointed out in this Brief the overwhelming weight of evidence was to the effect that Anna Locken was killed on property not belonging to the defendant corporation and as the lower court had stated that if pressed to make a finding on this issue he would find this issue against the appellant. Appellant did not urge this finding so invited the

error, if any, of which it now complains.

Counsel further, on page 7, states that respondent's counsel by objection prevented further survey from being made.

The appellee produced as a witness in the case a competent and licensed civil engineer and surveyor, the then official county engineer and surveyor of Baker County, wherein this property lies, a man fully familiar with this territory who had made a careful survey of this land from a well-established quarter section corner and known to him to be a correct quarter corner and testified positively that this land where Anna Locken was killed was not on the appellant's land (Coup D' Or claim) as contended by appellant at the trial. (T. 141-144 incl., 146-150 incl. Also Ex. 14 A and B and Z.)

He further testified that the government maps introduced in evidence from its data definitely showed that this land where the body lay was not on land owned by appellant. (T. same as above) He was the only licensed surveyor and engineer who testified. The only testimony offered by appellant on this matter, was that of a high school graduate who had done some work principally for the appellant corporation under a duly licensed engineer. This witness was not with an engineer or surveyor when he made this survey. (T. 187, Court's remarks T. 200) He never surveyed from

any established corner or quarter corner, but only from witness trees on this one claim. He never found any actual corner even at that claim. (T.189)

We also introduced the evidence of a man who claimed that he and his associates had been mining this property under claim of ownership and right of possession for more than ten years last past adverse to the appellant and to the world; that the portal of their mine ran directly under the road that crosses this canyon; that they worked the claim below and above where Anna Locken was injured and that at and near the spot where she was electrocuted they had demanded and caused the appellant corporation to repair damage it had caused to this property, doing work not in connection with mining operations at this point. (T. 153)

We felt that we had definitely proved beyond all reasonable doubt that Anna Locken was not electrocuted on property of the corporation by the only competent evidence introduced at the trial. From remarks of appellee's counsel and remarks of the Court (T. 256-257) it is clearly shown that appellee urged a clear-cut finding on whose property Anna Locken was killed and from remarks of Mr. Kilgenny and the Court (T. 258) that appellant did not insist upon such a finding. If there was any fault or deficiency in this respect it was clearly against appellee's desires and on the reluctance of

the appellant to urge such finding.

The Court however took the theory that if he was going to decide this question of title and that if he were pressed to make such a decision by the appellant that he would decide against the appellant as shown by his remark as follows:—

“The Court: If the defendant insists that I find on this question, I will find for the defendant.

Mr. Kilkenny: No. I am not going to insist. I do not know what Mr. Powers will do.

The Court: I think there is some evidence from which I might find against the defendant, but I did not feel like I should do that—I had not made up my mind on the question. I stated that at the time, that I thought that would be the result, and I stated where the burden of proof lay, and I figured the burden of proof lay upon the plaintiff, and the burden had been carried by the plaintiff, and if the defendant felt it was on its property, then contributory negligence might be established in that event, and the defendant in that regard had the affirmative burden of proof.” (T. 258)

By the first statement of the Court before Mr. Kilkenny, representing Mr. Powers, stated that he was not going to insist clearly indicates the Court would make such a finding for the appellant, but he also clearly indicates that that finding would be against the appellant and that is the reason that

Mr. Kilkenny did not insist.

The Court also in his remarks states:

"But, in any event, it was within a few feet of the property line, and in such a situation that the defendant is bound to use just as much care as if the line had fallen on property owned by another or upon the public highway, in view of all the circumstances." (252)

It appeared to the writers of this brief that the Court would not make this finding for the reason that Mr. Nelson, county engineer and surveyor of Baker County, had made his survey from a well-established quarter section corner rather than a section corner. Mr. Nelson, however, testified that that survey was as positive as if he had surveyed from a section corner. (T. 144, 146-147)

The undisputed testimony, we believe, shows that the greater portion of Red Jacket Canyon, where the transmission line spans the same, and where the energized wire was down, was not on appellant's property. Its' Coup D' Or claim, the only property owned by appellant that they claim was under the transmission line, was on the westerly side of the canyon and as stated by the Court, the place where appellant was electrocuted was close to the line of its' property.

### **Respondent's Answer to Appellants Specifications of Error.**

Appellant's principal contention in its speci-

fications of error and the only one which we feel this Court could feel is worthy of any consideration, is that the District Court and the Circuit Court of Appeals failed to apply the law of Oregon to the facts in this case. It is our position that this contention is not true. We submit that it is the law of Oregon:

1. A plaintiff is only required to establish the material allegations of his complaint by a preponderance of the evidence.

Minter v. Minter, 80 Or. 369, 157 Pac. 157;  
Botting v. Polsky, 101 Or. 530, 201 Pac. 188;  
Gray v. Hammond Lumber Co., et al, 113 Or.  
570; 232 Pac. 637; 233 Pac. 561; 234 Pac. 261.

2. A defendant pleading an affirmative defense has the burden of establishing such defense by a preponderance of the evidence.

Oregon Compiled Laws Annotated, Vol. 1,  
p. 254, Sec. 2-301;  
Consort v. Andrew, 61 Or. 483, 123 Pac. 46;  
Sorenson v. Kribs, 82 Or. 130, 161 Pac. 405;  
West v. Kern, 88 Or. 247, 171 Pac. 413,  
Saylor v. Enterprise Electric Co., 110 Or. 231,  
222 Pac. 304, 223 Pac. 725;  
Ordeman v. Watkins, 114 Or. 581, 236 Pac. 483.

3. Entry upon unfenced forest lands where stock and pedestrians habitually go and come, is a mere technical trespass of no avail as a defense where death is caused by instrumentality known to

be likely to cause death or great bodily harm.

Campbell v. Bredewell, 5 Or. 311;  
Moses v. S. P. R. R. Co., 18 Or. 385;  
Wilmot v. Oregon Railroad Co., 48 Or. 494, 87  
Pac. 528;  
Crepe and Harris v. Davis, et al, 107 Or. 142,  
214, Pac. 343;  
Hill vs. Tualatin Academy, 61 Or. 190, 121 Pac.  
901;

4. Those engaged in the transmission of such  
a dangerous commodity as electricity must exercise  
the utmost care to avoid injury to others.

Saylor v. Enterprise Electric Co., 110 Or. 231,  
222 Pac. 304;  
Sanders v. California-Oregon Power Co., 133 Or.  
571, 291 Pac. 365;  
Sullivan v. Mountain States Power Co., 139 Or.  
282, 9 Pac. (2nd), 1038.

5. One who enters upon the premises of an-  
other by invitation expressed or implied, is not a  
trespasser or a bare licensee, and the owner of the  
premises owes him the duty of due care.

Cederson v. Oregon Navigation Company, 38  
Or. 343, 62 Pac. 637;  
Hise v. City of North Bend, 138 Or. 150, 6 Pac.  
(2nd) 30.

6. Whether or not Anna Locken was a tres-  
passer on land owned by others than appellant in  
no case is available as a defense by appellant.

Turnidge v. Thompson, 89 Or. 637, 175 Pac. 281;  
Cooper v. North Coast Power Co., et al, 117 Or.  
652, 244 Pac. 665; 245 Pac. 317;

Appellant bases its contention that the District Court and the Circuit Court of Appeals failed to apply the Oregon law in this case on the assumption that plaintiffs decedent was a bare licensee and that under the Oregon law, a licensee can never recover except for wanton negligence or intentional wrong. It cites as its authority for this, three Oregon cases, in none of which are the facts in any manner even similar to the situation found in the case here.

The case of *Lang v. St. Johns Lumber Company*, 115 Or. 337, was a case where the plaintiff was injured falling down a lumber shoot in a dock which she was crossing after night to visit the captain of a ship.

The case of *Kesterson, et al, v. California-Oregon Power Company*, 114 Or. 22, which the Circuit Court of Appeals in its opinion pointed out was not in point in this case, was an action for damages for the burning of lumber piled under defendant's power line and upon its right-of-way.

The case of *Napier v. First Congregational Church*, 157 Or. 110, was an action for damages for injuries resulting from falling down a stairway while looking for a lavatory. In the latter case, the Oregon Supreme Court distinguished it from the case of *Hill v. Tualatin Academy*, 61 Or. 190, saying that in the *Napier* case, no dangerous in-

strumentality was involved.

We firmly believe that the preponderance of the evidence in this case shows that Anna Locken was not upon defendant's land at the time she met her death, but appellant's assumption that the law laid down in the authorities it cites applies to all cases in which a licensee is involved, is entirely without foundation. In our case, the evidence showed and the Court found that the land in the canyon at and near the place where Anna Locken met her death had, for many years prior thereto, been crossed and travelled by the public generally without objection from anyone, and in the case of *Cederson v. Oregon Navigation Company*, 38 Or. 343, which was a case where plaintiff's decedent was killed upon the defendant's right-of-way by a car jumping the track, the Oregon Supreme Court, in sustaining a verdict for the plaintiff, among other things, said:

"The wagon road at that point was in frequent and constant use by Seufert Bros. Company's employees, both on foot and with teams, especially during the fishing season, and more or less by the general public. This state of affairs continued for a long time, which taken in connection with the manner in which the wagon road was constructed and its proximity to the side-track tends, in some measure at least, to show that defendant was cognizant of the conditions, and that they so existed with something more than its tacit consent, or, rather, that they existed with its approval. **If the**

**decendent was a licensee by invitation or inducement, then it was incumbent upon the defendant to exercise active vigilance in respect to him.** It was forewarned, and should have been forearmed.

In the case of Hise v. City of North Bend, et al, 138 Or. 150, which was a case involving the driving of an automobile off the end of a municipal dock, the defendant City, in its Answer, after denying all the charges of negligence, set up the affirmative defense that "the plaintiff was a trespasser or a bare licensee upon the wharf, and his injury was not due to any willful or wanton conduct on the part of the City" The Oregon Supreme Court, in sustaining a verdict for the plaintiff, said:

"The city next argues that the circuit court erred when it refused to instruct the jury as follows: 'If you find that the plaintiff drove out and upon the wharf of the defendant, the City of North Bend, and therefrom into the waters of Coos Bay and that at the time he did so, he was upon said wharf without the invitation, express or implied, of the defendant city of North Bend, nor with its consent, nor on any business connected with said wharf, he was at that time a bare licensee.' As will be observed from the evidence previously reviewed, Virginia Street led directly to this wharf and the latter was only 775 feet from the center of the city. No obstructions or gates prevented free access to the wharf. No signs forbade the public from entering any part of it. Although the members of the city council knew that the wharf was being daily used by the public, no effort was made to obstruct access to it."

At page 62, the Court said:

"It seems to us that the above conduct upon the part of the city could readily warrant a finding that an invitation, at least an implied one, had been extended to the general public, including the plaintiff, to enter upon the wharf: *Bennett v. City of Portland*, 124 Or. 691 (265 p. 433); 45 C. J., Negligence, p. 808, Par. 218. See also, *Gray v. King County*, 140 Wash. 169 (248 p. 397.)"

"Since we have concluded that the evidence was capable of sustaining a finding that the plaintiff had been invited upon the wharf, it necessarily follows that it was the duty of the city to exercise reasonable care for his safety."

These cases show clearly that under the law of Oregon, the defendant could be liable for the wrongful death of Anna Locken, even if she was on its land and, as a result, it was not necessary for the Court to determine who held the legal title to the land at the exact spot where she was killed, as long as it found that she was not a trespasser or guilty of contributory negligence, and that under the circumstances as shown by the evidence in the case, the defendant owed her the duty of due or reasonable care. These are exactly the things that the Court did find, and its decision was in accordance with the law laid down by the decided cases of the Supreme Court of Oregon.

There is apparently no Oregon case deciding the law on a state of facts exactly the same as we have here, but the cases we have cited, we feel, are

amply sufficient to show that if the facts in this case were before the Oregon Supreme Court, it could, under its previous decisions and, we believe without question, would decide exactly as the District Court of the United States for the District of Oregon and the Circuit Court of Appeals for the Ninth District has decided this case.

Appellant's specification of error that the Court failed to comply with the requirements of Rule 52 (a), we believe, is not worthy of any consideration.

The Court's findings (T. pps. 23 to 33) contain 14 separate findings of fact and 3 conclusions of law. They fully cover every issue in the case and show the ground upon which the Court's decision was based.

In finding 8 (T. 26), the Court found:

"The land in said Canyon at and near the place where Anna Locken met her death had, for many years prior thereto, been crossed and travelled by the public generally without objection from anyone, and no danger or warning signs whatsoever, at or prior to the time of the death of Anna Locken, were placed at or near any of said properties in said Canyon."

In finding 9 (T. 28), the Court found:

"That the defendant corporation knew, or should have known, that other persons owned land in said canyon under its power line, and that other people were accustomed to, had a right to, and did walk and travel in and through said canyon and under said line where it cross-

ed said canyon at and near the place where the said Anna Locken was walking at the time she came in contact with said wire; \* \* \* ”

In finding 9 (T. 27), the Court found:

“That on the 20th day of May, 1942, Anna Locken was lawfully walking in said canyon at or near the boundary line of a claim owned by said corporation and a claim owned by third parties, \* \* \* ”

That in finding 13 (T. 31), the Court found:

“That the said Anna Locken was not a trespasser in entering into and upon the said lands at the place where she met her death \* \* \* ”

In finding 12 (T. 31), the Court found:

“That the decedent, Anna Locken, was not guilty of any contributory negligence in bringing herself in contact with said wire \* \* \* ”

In conclusions No. 2 (T. 32), the Court found:

“That the defendant corporation owed to Anna Locken the duty of due care, and her death was the proximate result of defendant’s carelessness, negligence and recklessness, and its failure to exercise due care for the safety of Anna Locken.”

It is our contention that these portions of the findings alone are sufficient to clearly show the basis of the Court’s decision, and to comply with the requirements of the rule cited.

“Findings in which a Federal District Court and a Circuit Court of Appeals have concurred will be accepted by the Supreme Court where they are not shown to be plainly erroneous or unsupported by evidence.”

Pick Manufacturing Company v. General Motors Corporation, 299 U. S. 3;  
Virginia Railroad Company v. System Federation, 300 U. S. 515;

Defendant's last Assignment of Error is a claim that there is insufficient evidence to support the Court's conclusions, and particularly the conclusion that defendant would be liable, even if deceased was a technical or other kind of trespasser, and that defendant was guilty of wanton negligence. The Court made no such conclusions as appellant is complaining of. The Court's conclusion was that defendant failed to exercise due care for the safety of Anna Locken. This, under the law of Oregon, is ordinary negligence.

"In view of these circumstances, the degree of care imposed was commensurate with the danger. 'Due care is a degree of care corresponding to the danger involved': Cooley, Torts. It is not the same in all cases. The term is relative, and its application depends on the situation of the parties, and the degree of care and vigilance which the circumstances reasonably impose."

Ahern v. Oregon Telephone Co., 24 Or. 276, 33 Pac. 403;

Nothing was said by the Court in its conclusions about deceased being a technical or other kind of trespasser. It may be that what appellant meant by conclusions of law, was findings of fact, but even if this is true, what we have already said is also true.

In finding No. 9 (T. 29), the Court said that defendant's negligence amounted almost, if not to, wantonness, but it did not base its verdict upon this statement, and in finding No. 10 (T. 29), the Court found that Anna Locken met her death through the carelessness, negligence and recklessness of the defendant. All of these findings were amply supported by the evidence. The only reference that we know of to the effect of Anna Locken's being a technical or other kind of trespasser is a statement contained in the Opinion of the Circuit Court of Appeals. This statement was, in no manner, the basis of the decision and verdict of the Court and, as we read the rules of this Court and its decided cases, none of the matters above referred to would be any grounds for granting the appellant's Petition.

Appellant, in its Petition and Brief in support thereof, seems to take the position that this is a very important case. In reality, it is a simple action for wrongful death under the law of negligence, and the verdict was only for the sum of \$7,500.00. This case was brought in the Circuit Court of the State of Oregon for Union County in September, 1942. If it had been tried there it would have been settled years ago. The appellant filed a Motion for its removal to the District Court of the United States, where it was put at issue and

tried after considerable delay. Appellant then appealed to the Circuit Court of Appeals for the Ninth District, where the case was briefed, argued and affirmed. They are now attempting to have the matter heard before the Supreme Court of the United States. It has been over three years since this case was started. We feel that the conduct of the appellant in dragging this case through the Courts for this length of time has unduly delayed the proceedings upon the Judgment of the lower Court, and has been done merely for delay, and that appellant's Petition should be denied and the respondent allowed damages in accordance with Rule 30 of the rules of this Court.

We respectfully submit that the appellant's Petition should be denied, and costs and damages awarded the respondent.

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